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IN THE

Supreme Court of the United States

October Term, 1967

No. 901

JOSEPH T. STRONG, d/b/a STRONG ROOFING & INSULATING CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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NATIONAL LABOR RELATIONS BOARD,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner Joseph T. Strong, d/b/a STRONG ROOFING & INSULATING CO., prays that a writ of certiorari issue to review a portion of the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on July 14, 1967.

Opinions Below

The opinion of the Court of Appeals has not been officially reported and appears herein as Appendix A. The decision and order of the National Labor Relations Board, including the Trial Examiner's decision, is officially reported in 152 NLRB 9 (1965) and appears herein as Appendix B.

On or about September 22, 1967, the Board filed a timely petition for rehearing with respect to that por-

tion of the judgment of the Court of Appeals modifying the Board's order. In view of the fact that the law is unclear as to whether a party who does not file a petition for rehearing in the Court of Appeals has his time to file a petition for certiorari in this Court tolled by a petition for rehearing filed in the Court of Appeals by another party to the proceeding, petitioner is filing this petition to review a portion of the judgment of the Court of Appeals, even though the Board's motion for rehearing en banc with respect to another portion of the judgment is still pending in the Court of Appeals. Under these circumstances the Court may desire to defer ruling on this petition until the Board's petition for rehearing is ruled upon or until the Board either files a petition for certiorari or its time to file such petition expires. Cf. Stern & Gressman, Supreme Court Practice § 6-49 (3d ed. 1962).

Jurisdiction

The judgment of the Court of Appeals was entered on July 14, 1967. On October 5, 1967, Mr. Justice Douglas granted petitioner's request for an extension of time until December 11, 1967, in which to petition for certiorari. This Court has jurisdiction under 28 U.S.C. § 1254 (1) and 29 U.S.C. § 160(e).

Question Presented

Whether the Board was precluded by Section 10 (b) of the National Labor Relations Act, as amended (29 U.S.C. § 160(b)) from issuing the complaint herein in view of the fact that the underlying unfair labor practice charge was filed more than six months following petitioner's initial refusal to execute a multi-employer collective bargaining contract which the Board found he had a duty to execute.

Statutes Involved

This case involves Sections 8 (a) (1), 8 (a) (5), 10 (b) and 10 (e) of the National Labor Relations Act, as amended.[1] The relevant statutory provisions are set forth in Appendix C to this petition.

Statement

The portion of the judgment of the Court of Appeals which petitioner submits should be reviewed by this Court relates to the application of Section 10 (b) of the Act which provides that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge. A union[2] filed the unfair labor practice charge in the instant case on June 3, 1964, alleging that petitioner had violated Sections 8 (a) (1) and 8 (a) (5) of the Act by refusing to execute a multi-employer contract negotiated and agreed upon between the union and an employers' association,[3] of which petitioner was allegedly a member. (R.3.)[4] Agreement on the contract was reached on August 14, 1963, and petitioner unequivocally refused to sign said agreement no later than October 18 or 20, 1963.[5] (R.13, 16.) The charge was therefore filed more than six months after the initial refusal to execute the contract.

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[1] Referred to herein as the "Act."

[2] Roofers Local 36, United Slate, Tile, Composition and Damp and Waterproof Workers Association.

[3] Roofing Contractors Association of Southern California.

[4] References to the certified, typewritten transcript of the record are designated as "R". References to the official reporter's transcript are designated as "Tr."

[5] Although the Trial Examiner found that petitioner did communicate his refusal to sign the agreement no later than October 18 or 20, 1963, he also found that on August 20, 1963, petitioner wrote a letter to the Joint Labor Relations Board in which he requested termination of the contract (R. 15.)

Notwithstanding the date of the filing of the charge, the Board issued a complaint against petitioner on August 19, 1964, alleging that refusal to execute the contract violated Sections 8 (a) (1) and 8 (a) (5) of the Act. R.4-7) In his answer to the complaint and at all subsequent stages of this proceeding petitioner has raised the defense that the Board was precluded by Section 10 (b) from issuing the complaint. (R.9, 13, 23-24.) The Trial Examiner rejected this defense, holding that the subsequent refusals to sign in December, 1963, and April, 1964, had occurred within the six months prior to the filing of the charge and constituted separate unfair labor practices. (R.13.) The Board adopted the Trial Examiner's decision without opinion. The Court of Appeals affirmed this portion of the Board's decision, also concluding that the two refusals occurring within the six-month period constituted separate unfair labor practices. (See Court of Appeal's decision, Appendix A *infra*, pp. 2-4.)

Reasons for Granting the Writ

I

The Judgment of the Court of Appeals is Directly in Conflict in Principle with a Decision of the United States Supreme Court.

The decision of the Board and the Court of Appeals that in the instant case the Board was not precluded by Section 10 (b) of the Act from issuing a complaint and determining the charge is directly in conflict in principle with the decision of this Court in *Local Lodge 1424, International Association of Machinists, AFL-CIO, et al. v. NLRB (Bryan Manufacturing Company)*, 362 U.S. 411 (1960). In the *Bryan* case, this Court held that the Board was precluded from issuing the complaint alleging that a union and an employer were violating the Act by continuing to give effect to a contract executed more

than six months prior to the filing of the charge which such contract was allegedly unlawful because at the time of its execution the union did not represent a majority of the employees covered by said contract. The Board had contended that the violation was a continuing one since the contract was still being enforced within the six-month period immediately prior to the filing of the charge. This Court rejected the Board's argument and held that the entire foundation of the charge was the unlawful execution of the contract and since that occurred more than six months prior to the filing of the charge the Board was precluded from issuing the complaint.

In the instant case the entire foundation of the Union's unfair labor practice charge was that petitioner had refused to execute a multi-employer contract negotiated by an association of which petitioner remained a member during the negotiations and at the time the contract was agreed upon by virtue of his prior failure to have effectively withdrawn from the association multi-employer unit in the manner proscribed by Board decisions. As noted, the contract had been agreed upon between the Union and the association on August 14, 1963, and petitioner explicitly conveyed his intention not to sign said contract no later than October 18 or 20, 1963, more than six months prior to the filing of the charge on June 3, 1964.

Applying the rationale of the Board and the Court of Appeals that the further refusals made within six months prior to the filing of the charge constituted separate substantive unfair labor practices, the statute of limitations in Section 10 (b) would never commence to run in this case. Under such rationale, a demand to execute the contract could be made at any time even years after expiration of the contract, and a refusal would be the basis for a charge which would not be barred by Section

10 (b). And, of course, since the crux of the charge in the instant case was that petitioner had not effectively removed himself from the multi-employer unit and was therefore obligated to sign the contract negotiated by the association upon demand of the union, the issue upon which the outcome of the unfair labor practice charge would necessarily hinge would be whether, under a set of circumstances occurring years before, petitioner had in fact effectively withdrawn from the multi-employer unit. If this could occur, and under the theory of the Board and the Court of Appeals we submit it could, the result would be to frustrate the basic policy of Congress underlying Section 10 (b) to bar litigation of past events "after records have been destroyed, witnesses gone elsewhere, and recollections of the events in question have become dimmed and confused." *Local Lodge 1424, International Association of Machinists, AFL-CIO, et al. v. NLRB*, 362 U.S. at 419, quoting from H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 40. As further stated by the Court in the same case, "a finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the § 10 (b) proviso." 362 U.S. at 422.

II

The Judgment of the Court of Appeals is in Direct Conflict in Principle With a Judgment of the Court of Appeals for the Third Circuit.

The decision of the Board and the judgment of the Court of Appeals are also in direct conflict in principle with the decision of the Court of Appeals for the Third Circuit in *NLRB v. Pennwoven, Inc.*, 194 F.2d 521 (C.A. 3, 1952). In *Pennwoven*, the Court recognized that the employer had, contrary to its statutory duty, unlawfully discriminated against three employees in refusing to hire them following a shutdown. The Court held, however,

that the complaint was barred by Section 10 (b) because the initial refusal to hire occurred nine months prior to the filing of the charge, *even though the employer reaffirmed its position by refusing reinstatement requests shortly prior to the filing of the charge.* The Board also argued in that case as it does here that the unlawful refusal was repeated within the six-month period and therefore constituted a continuing violation. The Court rejected this argument because the basic unfair labor practice was the initial refusal to rehire and the subsequent refusal was merely a reaffirmation of the allegedly unlawful position previously taken.

Similarly, in the instant case, the basic unfair labor practice was complete *at the latest* on October 18 or 20, 1963 when petitioner explicitly conveyed to the Union his intention not to sign the multi-employer contract when requested to do so, and further refusals were simply reaffirmations of the earlier alleged unfair labor practice which was barred by Section 10 (b).

III

The Question Presented is of Far-Reaching Importance in the Proper Administration of the National Labor Relations Act.

The question raised by this petition is an important and recurring one in the administration of the National Labor Relations Act. In granting certiorari in *Local Lodge 1424, International Association of Machinists AFL-CIO, et al. v. NLRB (Bryan Manufacturing Company), supra,* this Court recognized its responsibility to require that the Board comply with the limitation provisions in Section 10 (b) in processing unfair labor practice charges.

Despite said decision in the *Bryan* case and the Third Circuit's decision in *NLRB v. Pennwoven, Inc., supra,* the Board's decision in this case demonstrates that it is

still unable to correctly apply Section 10 (b). There will be many future cases in which the Board will be required to decide whether Section 10 (b) precludes it from proceeding to determine unfair labor practice charges. These cases will present many varied fact situations. By granting certiorari in this case and clarifying the distinction between new and separate unfair labor practices and reaffirmations of earlier unfair labor practices, this Court will assist both the Board and its litigants in applying Section 10 (b) correctly. As a result, the Congressional intent to preclude the Board from relitigating stale claims will be preserved and considerable administrative delay and expense will be avoided by the elimination of such claims from the dockets of the Board and the courts.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully Submitted

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December, 1967

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. JOSEPH T. STRONG d/b/a STRONG ROOFING AND INSULATING CO., *Respondent.*	No. 20,762

[July 14, 1967]

On Petition for Enforcement of an Order of the National Labor Relations Board

Before: HAMLEY and JERTBERG, Circuit Judges, and WHELAN, District Judge.

WHELAN, District Judge:

This case is before the Court on the petition of the National Labor Relations Board to enforce its order against Respondent Joseph T. Strong d/b/a Strong Roofing and Insulating Co.

The Board's decision and order are reported at 152 N.L.R.B. No. 2. This Court has jurisdiction of the matter.

The Board found that respondent, by refusing to sign and honor a collective bargaining agreement negotiated on behalf of respondent by a multi-employer association to which respondent belonged and through which respondent participated with the Union, has refused to bargain and has engaged in unfair labor practices within the meaning of Section 8(a)(5) and Section 8(a)(1) of

the National Labor Relations Act, as amended, 29 U.S.C. 158(a)(5) and 158(a)(1).

Respondent was ordered by the Board to cease and desist from refusing to recognize the Union as the representative of respondent's employees in the multi-employer bargaining unit and refusing to honor the 1963-1967 contract between the Union and the Association and from, in any like or related manner, interfering with, restraining or coercing his employees in the exercise of their statutory rights. Respondent was also ordered to forthwith execute and honor the 1963-1967 contract and to pay to the appropriate source any fringe benefits provided for in the above described contract, as well as to post the usual notice and give notification of the posting of the notice to the representative of the Board within the time provided in the order.

While before the Board respondent contended that the Board did not have jurisdiction to hear the complaint against respondent in that respondent was not engaged in a business affecting commerce within the meaning of Sections 2(6) and 2(7) of the National Labor Relations Act, as amended, and has not engaged in conduct affecting commerce over which the Board has jurisdiction under Section 10(a) of said Act, the respondent has abandoned such contention before this Court.[1]

Resisting the petition for enforcement, respondent first argues that the unfair labor practice charge was filed more than six months following respondent's refusal to execute the multi-employer contract.

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[1]In any event, the Board found that the operations of respondent do affect commerce within the meaning of said Sections 2(6) and 2(7) of the Act; and such finding is supported by substantial evidence and such finding is correct.

The unfair labor practice charge was filed on June 3, 1964. On October 18, 1963, the Union representative contacted respondent's wife who managed the office of respondent in an attempt to have the 1963-1967 multi-employer contract with the Union signed. Respondent's wife told the representative that respondent had withdrawn from the Association and therefore would not sign. The following day she told the Union representative that she had spoken to respondent, who had confirmed his intent to withdraw from the Association, and that he therefore would not sign the agreement. Again on December 10, 1963, respondent's wife said respondent would not sign the contract because he no longer employed any Union members. Finally in April 1964 respondent was again contacted by a Union representative, at which time respondent refused to sign the contract for "economic reasons."

While it is true that the first refusal to sign the contract in October 1963 was barred as the basis of an unfair labor practice charge by Section 10(b) of the Act as being more than six months prior to the date of the filing of the unfair labor practice charge, and while it is true that had nothing further occurred thereafter respondent's contention would be well taken, here there were further refusals within a period of six months prior to the date of filing of the charge.

The obligation of respondent to bargain collectively with the Union was a continuing one. *N.L.R.B. v. White Construction Co.*, 204 F.2d 950, 952-953; (5th Cir. 1953) 204 F.2d 950, 953. Respondent had the obligation to bargain collectively and to execute the contract when the Union requested him so to do. Section 8(d) of the Act, Title 29, U.S.C., 158(d). This obligation extends to the execution of a bargaining agreement executed by an employers Association of which an employer is a member

with the Union. *N.L.R.B. v. Jeffries Banknote Co.*, (9th Cir. 1960) 281 F.2d 893, 896.

Respondent's reliance on *Local 1424, I.A.M. v. N.L.R.B.*, 362 U.S. 411, is without merit. In *Local 1424, supra,* the Supreme Court said at 362 U.S. pp. 416-417:

> "[I]n applying rules of evidence as to the admissibility of past events, due regard for the purposes of Section 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose Section 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be unfair labor practice only through reliance on an earlier unfair labor practice. There the use of earlier unfair labor practices is not merely 'evidentiary' since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful."

In the instant case each of the two refusals of respondent to sign the contract within the six month limitation period in and of itself constitutes, as a substantive matter, unfair labor practice. Therefore, the Board was entitled to consider the refusal of respondent in October 1963 to sign the contract as evidence to shed light on the true character of the refusals occurring within the limitation period. *International Union, United Automobile, etc. Workers of America, AFL-CIO v. N.L.R.B.*, (D.C. Cir. 1966) 363 F.2d 706-707.

Respondent next argues that the Union was estopped by its conduct during the period commencing August 1963 and ending June 3, 1964, from contending that it did not consent to the respondent's withdrawal from the multi-employer unit and release from the obligations of the multi-employer contract.

The examiner's findings concerning the question of estoppel, adopted by the Board, may be summarized briefly as follows:

Respondent is an individual engaged in the roofing of residential and commercial buildings. He joined the Roofing Contractors Association of Southern California, Inc. (hereafter the Association) about 1949 and at one time served as its president. He had for many years been a regular member as defined in the Association's by-laws.

The Association was formed for the purpose, inter alia, of negotiating labor contracts with Roofers Local 36, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association (hereafter Union). By-laws of the Association provide for regular members and also for associate contractor members. Regular members are contractors who operate union shops and who, under the by-laws of the Association, are bound by the collective bargaining contract negotiated by the Association. Associate contractor members are contractors who operate non-union shops and who are not covered by the Association's collective bargaining agreement.

As a regular member of the Association, respondent signed the August 15, 1960, to August 14, 1963, agreement with the Union and the Association. During such contract term and on January 23, 1962, respondent wrote the Union requesting termination of the contract at the earliest possible time. He received no response to such letter. There is no evidence that such letter was ever

transmitted to the Association. However, under the terms of such contract, respondent could not terminate such agreement as such contract was for a fixed period. Despite his letter he continued to observe the contract and paid fringe benefits to the Union Roofers Trust Account.

Prior to the start of contract negotiations with the Union in March of 1963, the Association mailed authorization proxies to its regular members, including respondent, for their information only. Whether or not the regular members sign proxies they are bound by any agreement reached in the negotiation. Respondent neither signed nor returned the proxy; respondent testified that in the past he had not always signed the proxies. The negotiations between the Union and Association continued until August 14, 1963, when the terms of a new four-year contract was agreed upon; the contract was ratified by the Union membership on August 17, 1963, and had an effective date of August 15, 1963. During the negotiations the Association informed all regular members, including respondent, of progress and invited them to attend two open negotiating sessions.

Respondent did not notify the Association that he was withdrawing as a regular member of the Association prior to the execution of the 1963-1967 contract.

Though regular members are automatically bound by the negotiated collective bargaining agreement, it has been the past practice of the Union to have each of the members sign a copy of the contract.

On August 20, 1963, respondent wrote the Joint Labor Relations Board, a grievance board composed of contractor and Union representatives, requesting termination of the contract and the refund of his security deposit pursuant to the Master Agreement dated August 15, 1963.

Upon receipt of this letter the Joint Labor Relations Board, without further action, turned it over to the Association's representative.

In September 1963 respondent telephoned the Association and requested that his status be changed from that of a regular member to that of an associate contractor member, but he paid the high regular member dues in October, November, and December of 1963 and paid fringe benefits to the Union Roofers Trust Fund in September and October of 1963. Under the terms of the 1963-1967 contract, respondent could not unilaterally terminate the contract.

In December 1963 the Association credited his account with the difference between the regular and associate membership dues for October, November, and December of that year, and in January 1964 returned to him his deposit given as security to the Association to insure payment of wages and fringe benefits by him. Prior to the return of the deposit by the Association, he had not received an answer of his August 20, 1963, letter to the Joint Labor Relations Board requesting termination of the contract.

In the three contacts of respondent by the Union in October and December of 1963, and in April of 1964, the Union representatives merely asked respondent to sign the agreement and did not state that respondent was bound by the Association-wide master contract. What did occur on those three occasions was the request by the Union representatives that respondent sign an individual contract after the master agreement had been negotiated precisely as respondent had been requested with respect to earlier contracts so to sign and as other regular members of the Association were requested both with respect to the 1963-1967 contract and earlier contracts.

The trial examiner found that the failure of the Union representatives to tell respondent that he was bound by the master contract was not evidence of a waiver and the Board adopted such finding.

The reviewing power of this Court over orders of the Board is set forth in Section 10(f) of the Act, which states:

> "[T]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

The standard of review set forth in that provision is elaborated upon in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 464 (1951) and its companion case, *N.L.R.B. v. Pittsburgh S.S. Company*, 340 U.S. 498 (1951). If the findings are not supported by substantial evidence on the record when considered as a whole, it is our duty to set aside and refuse enforcement of the order of the Board. *Universal Camera Corp. v. N.L.R.B., supra; N.L.R.B. v. Isis Plumbing and Heating Co.*, 322 F.2d 913 (9th Cir. 1963); *Lozano Enterprises v. N.L.R.B.*, 357 F.2d 509 (9th Cir. 1966).

Under the rationale expressed in *Universal Camera, supra*, it is our duty in determining the substantiality of evidence supporting a Labor Board decision to take into account contradictory evidence or evidence from which conflicting inferences could be drawn.

> "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera, supra*, at 847.

We do not find the inferences drawn from the record by the trial examiner to be unreasonable.

In our view the findings of the Board are supported by substantial evidence in the record considered as a whole, and are therefore conclusive upon us.

However, respondent's contention that the Board erred in including in its order a requirement that respondent pay to the appropriate source any fringe benefits provided for in the contract between the Association and the Union is well taken. In general, the Board has no power to adjudicate contractual disputes. *N.L.R.B. v. Hyde,* (9th Cir. 1964) 339 F.2d 568, 572; *United Steel Workers of America, AFL-CIO v. American International Aluminum Corp.,* (5th Cir.) 334 F.2d 147, 152. Here the unfair labor practice was the refusal to bargain by refusing to execute the contract. The order of the Board requiring the payment of fringe benefits to the appropriate source is an order to respondent to carry out provisions of the contract and is beyond the power of the Board. See *N.L.R.B. v. Hyde, supra,* at pp. 572-573. *Cf. N.L.R.B. v. George E. Light Boat Storage, Inc.,* (5th Cir. 1967) 373 F.2d 762. Therefore, the order of the Board is modified to eliminate therefrom paragraph 2(b) requiring that respondent "pay to the appropriate source any fringe benefits provided for in the above described contract" and to remove from the required notice to be posted that paragraph which reads "We will make whole the appropriate sources for any unpaid fringe benefits provided in the above contract."

As so modified, the order of the Board will be enforced.

APPENDIX B

D-6968
Alhambra, Calif.

152 NLRB No. 2

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

JOSEPH T. STRONG d/b/a
STRONG ROOFING & INSULATING CO.

and Case No. 21-CA-5978

ROOFERS LOCAL 36, UNITED SLATE,
TILE AND COMPOSITION ROOFERS, DAMP
AND WATERPROOF WORKERS ASSOCIATION

DECISION AND ORDER

On January 8, 1965, Trial Examiner Martin S. Bennett issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Trial Examiner's Decision attached hereto. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief. The General Council filed a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision,

the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board hereby adopts as its Order, the Order recommended by the Trial Examiner and orders that Respondent, Strong Roofing & Insulating Co., its agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., Apr. 19, 1965

JOHN H. FANNING, Member

GERALD A. BROWN, Member

HOWARD JENKINS, JR., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

152 NLRB No. 2

TXD-(SF)-151-64
Alhambra, Calif.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

JOSEPH T. STRONG d/b/a
STRONG ROOFING & INSULATING CO.

and Case No. 21-CA-5978

ROOFERS LOCAL 36, UNITED SLATE,
TILE AND COMPOSITION ROOFERS, DAMP
AND WATERPROOF WORKERS ASSOCIATION

HAROLD E. JAHN, for the General Counsel.

O'MELVENY & MYERS, by ALFRED C.
PHILLIPS, of Los Angeles, Calif., for
Respondent.

EUGENE MILLER, of Los Angeles, Calif.,
for the Union.

Before: MARTIN S. BENNETT, Trial Examiner.

TRIAL EXAMINER'S DECISION

Statement of the Case

This matter was heard at Los Angeles, California, on October 20, 1964. The complaint[1] alleges that Respondent, Joseph T. Strong d/b/a Strong Roofing & Insulating Co., had engaged in unfair labor practices within the meaning of Section 8(a)(5) and 8(a)(1) of the Act. Oral

[1] Issued August 19, and based upon a charge filed June 3, 1964, by Roofers Local 36, United Slate, Tile and Composition Roofer, Damp and Waterproof Workers Association, herein called the Union.

argument was waived and briefs have been submitted by the General Counsel and Respondent.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

Findings of Fact

I. Jurisdictional findings

Joseph T. Strong, an individual proprietor doing business under the trade name and style of Strong Roofing & Insulating Co., is engaged in the roofing of residential and commercial buildings. This concern annually purchases supplies valued at less than $50,000.

Since approximately 1949, but not after September of 1964, Respondent was a member of Roofing Contractors' Association of Southern California, Inc., herein called the Association. The latter is an association of roofing contractors in Southern California which negotiates collective bargaining agreements in behalf of its members with the charging Union and its sister Local 72. At least one of the members of this Association annually performs services valued in excess of $50,000 outside the State of California.

Finding hereinafter that Respondent was a member of this Association at the time material herein, I further find that the operations of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act and that it would effectuate the purposes of the Act to assert jurisdiction herein. *N.L.R.B.* v. *Miscellaneous General Drivers, Local 610,* 293 F.2d 437 (C.A. 8), and *Insulation Contractors of Southern California, Inc.,* 110 NLRB 638.

II. The labor organization involved

Roofers Local 36, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association is

a labor organization within the meaning of Section 2(5) of the Act.

III. The unfair labor practices

A. The issue; introduction

A contract between the Association, in behalf of its members, and the Union was in effect from August 15, 1960, to August 14, 1963. Negotiations on a successor contract commenced in March of 1963 and an agreement was arrived at on August 14, 1963, for the period from August 15, 1963, through August 15, 1967. Both contracts provided for year to year renewal after the stated term, absent a 60-day notice prior to the end of said term or any subsequent yearly period.

Respondent has refused to sign and honor the 1963-1967 agreement, claiming that it withdrew from the multi-employer bargaining unit and, further, that the Union consented to this withdrawal. The General Counsel alleges that Respondent's attempted withdrawal took place at an inappropriate time and urges, contrary to Respondent, that the Union never waived its rights herein; he contends that a refusal to bargain took place on and after June 2, 1964.[2]

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[2] The complaint refers to prior conduct which was fully litigated herein. Respondent has contended that the six-month statute of limitations established by Section 10(b) bars the complaint, and relies upon the Union's first demand in October, 1963, described below, that the Respondent sign the Association contract; the evidence, however, goes beyond and treats with Respondent's subsequent refusals to honor the contract. More particularly, aside from a meeting in December of 1963, there is evidence that a union representative met with Respondent in April of 1964, the date the General Counsel presumably had in mind, and the charge was filed on June 3, 1964. Consequently, the rationale of *Local Lodge No. 1424, I.A.M. v. N.L.R.B.* (*Bryan*), 362 U.S. 411, is deemed not to be in point. See *Local Union No. 269*, I.B.E.W., 149 NLRB No. 74.

It may be noted that the Association has 85 "regular" members who operate unionized shops in behalf of whom, as stated, it has for many years negotiated an association-wide contract. Since June of 1962, it has recognized a new category of associate contractor members, some 10 or 11 in number; these operate non-union shops and are not covered by the contract. Treated with hereinafter is Respondent's change of its membership from a regular to an associate contractor membership, as well as its resignation from the Association, and the effect of these moves upon Respondent's coverage by the contract.

B. Appropriate unit and majority representation therein

The General Counsel contends that all roofers employed by [regular] members of the Association constitute a unit appropriate for the purposes of collective bargaining. This is an association-wide unit of the type regularly recognized by the Board and I find it is an appropriate unit within the meaning of Section 9(b) of the Act.

The General Counsel further contends that at all times since August 15, 1963, the effective date of the most recent agreement, the Union has been the representative af a majority of the employees in the above-described unit, including those of Respondent. Respondent does not dispute the Union's representative status among the other members of the Association, but again predicates its denial of said representative status among the employees of Respondent upon its attempted withdrawal from the unit. For reasons hereinafter set forth, I find that the Union has been at all times material herein, and now is, the exclusive representative of all employees in said unit within the meaning of Section 9(a) of the Act.

C. **Sequence of events**

As set forth, a contract between the Association and the Union was in effect from August 15, 1960, through August 14, 1963. Respondent, as a regular member of the Association, was bound by this contract and adhered to its terms. Indeed, consistent with custom whereby the Union obtained signed copies of the contracts from the respective members of the Association, Joseph Strong had signed the 1960 contract.[3] On January 23, 1962, Respondent wrote to the Union, as follows:

> Persuant (sic) to Article IX, paragraphs A, and B, in the Master Labor Agreement dated August 15, 1960 to August 14, 1963, inclusive, I, J. T. Strong dba as sole proprietor of the Strong Roofing and Insulating Company located at 710 South Garfield Avenue, Alhambra, do hereby respectfully request termination of the above Master Labor Agreement.
>
> Date of termination to be soon as possible under the terms of the Agreement.
>
> Request this intent of termination to be brought to the attention at the next regular meeting of the Joint Labor Relations Board, at their February 6, 1962, meeting.

Strong testified that he believed that this clause, as well as an identical clause in the 1963-1967 contract, permitted him to terminate the contract on 60 days' notice. However, it is quite clear that the clause in both contracts does not so provide. It establishes a term from August 15, 1960, through August 14, 1963, and from year to year thereafter, absent 60 days' notice prior to August 14,

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[3] All regular members of the Association give it the right to bargain for them; agree under the By-Laws not to engage in individual bargaining; and agree to accept the negotiated contract.

1963, or the end of any subsequent yearly period to terminate or modify the contract. Furthermore, Strong never received a reply to this letter, which was sent via regular mail and there is no direct evidence of its receipt by the Union. Respondent continued to live up to the terms of the agreement in all respects, including payment of fringe benefits.

Negotiations for a successor contract covered the period from March 1963, through August 14, 1963. A new contract was reached on August 14, for a term from August 15, 1963, through August 15, 1967.

There is evidence by Executive Director David Van Eyk of the Association that all members of the Association were kept posted as to the progress of the 1963 negotiations. Two open negotiating meetings were held on May 24 and July 13, 1963, and all regular members were invited to attend. And, on July 27, each regular member was mailed a document reflecting all contract matters that had been agreed upon as of that date. Moreover, on September 24, 1963, Respondent made fringe payments to the "Union Roofers Trust Account" for the month ending August 31 as required by the Association's contract with the Union. And, on October 19, 1963, a similar payment was made for the month ending September 25, 1963.

On August 20, 1963, Respondent wrote to the Joint Labor Relations Board. This is a Board set up under the grievance procedure of the contracts, composed equally of contractor and union representatives, to handle grievances or disputes under the contracts. The letter was referred to the Association, and no issue is raised by the General Counsel as to whether it was sent to the proper party.[4] In the letter, Strong stated:

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[4] This registered letter was not delivered until August 27.

Persuant(sic) of that Artle(sic) in the Master Agreement dated August 15, 1963; to and including August 15, 1967; pertaining to the termination of the Master Contract, I, J. T. Strong d.b.a. as the Strong Roofing & Insulation Company, located at 710 South Garfield Avenue, Alhambra; request action in accordance with the above noted Article in the current Master Aggrement(sic).

Date of termination to be set at next regular meeting of the J.L.R.B., who shall release depost(sic) of $400.00 held as guarantee of faithful performance regarding labor payments as so described in Master Agreement.

Here as well, it is apparent that Strong believed that the language he referred to provided for a 60-day notice pursuant to which he could be released from the provisions of the contract. The reference to the $400 bond is to a bond required of the regular members of the Association under the Master Labor Contract to insure payment of wages and fringe benefits. Strong also testified that he had made the fringe benefit payments in September and October, described above, pursuant to his concept of honoring the contract for its last 60 days.

About the end of September, according to Van Eyk, Strong telephoned the Association and asked that his status as a regular member [under the contract] be changed to that of an associate contractor member [non-union]; this meant a reduction from $17.25 to $15.00 per month in dues. Respondent continued to pay the higher sum on or about the first of the months of October, November and December of 1963. On December 18, the Association reduced the amount of the payment to $15 per month and placed a credit of $6.75 to Respondent on its books; this reflected a credit of $2.25 for each of the months of October, November and December. I find that the status of Respondent was changed to that of an

associate contractor member on December 18, retroactive to October 1, 1963.

On September 30, 1963, the Association cancelled Respondent's bond and on January 3, 1964, the cash deposit of $400 was returned to him. The record further discloses that in September of 1964, Respondent withdrew from the Association.

There have been three contacts of Respondent by representatives of the Union subsequent to the signing of the contract on August 14, 1963. On October 18 or 20, 1963, according to Mrs. Joseph Strong who handles administrative details for Respondent, one Sheridan, a representative of the Union, called at the office and stated that the Union wished Respondent to sign a copy of the newly-negotiated agreement. As noted, this had been routine practice for many years. Mrs. Strong refused to sign, stating that her husband had previously notified the Association of his intent not to re-sign, manifestly a reference to the letter of August 20, 1963. Mrs. Strong reaffirmed this position in a telephone conversation with Sheridan on the following day.

Sheridan again visited Respondent's office on December 10, 1963, and, according to Mrs. Strong, renewed his request that Respondent sign the contract. Mrs. Strong refused, stating that she no longer had any "union men" and claiming that several [if not all] of her employees had withdrawn from the Union and were going into business for themselves.

In April of 1964, William Nuttall, a representative of the Union, called upon Strong and asked him to sign the contract. Strong refused, referred to the number of non-union contractors in the area and stated, according to Nuttall, that "he would rather go non-union rather than sign it . . ." Strong admitted refusing to sign the contract "for economic reasons."

D. **Analysis and conclusions**

The Board recognizes that employer members of a multi-employer bargaining unit may withdraw from multi-employer bargaining. See, e.g. *Seattle Automotive Wholesalers Association,* 140 NLRB 1393. But a basic requisite has been that an employer do so unequivocally and at an appropriate time. And the Board has made it clear that an attempt at withdrawal *after* a multi-employer agreement has been reached is ineffective because the time has become inappropriate. See e.g., *N.L.R.B.* v. *Jeffries Banknote Co.,* 281 F.2d 893 (C.A. 9); *Fairbanks Dairy,* 146 NLRB No. 111; *Cooke & Jones, Inc.,* 146 NLRB No. 192; *Walker Electric Co.,* 142 NLRB 1214; and *Donaldson Sales, Inc.,* 141 NLRB 1303.

In the instant case, Respondent's letter of January 23, 1962, manifestly had no legal effect because the contract did not expire until August 14, 1963, and it did not provide for a prior termination. And, in 1963, while negotiations were going on for a new contract, Respondent was put on notice thereof but took no steps to withdraw from the Association. Indeed, it proceeded to honor the new contract and lived up to its fringe benefit requirements for the months of August and September of 1963.

Respondent has argued that in the three contacts with it by the Union, described above, the union representatives merely asked Respondent to sign the agreement and did not state that Respondent was bound by the Association-wide master contract. But it is clear that Respondent, and the record discloses that Strong was a past president of the Association presumably familiar with its procedures, was asked, on these occasions, to sign an individual contract after the master agreement had been negotiated precisely as it had been in the past; the other regular members of the Association were also so asked. Stated otherwise, the Association-wide con-

tract was negotiated in 1963, and the members of the Association were thereafter respectively asked to sign individual copies, just as had been done in the past. This is not evidence of a waiver and Respondent's contention to that effect is rejected.

While Respondent changed its membership to that of associate contractor member, after the signing of the 1963 contract; reclaimed its bond; and, in 1964, withdrew from the Association, I fail to see how this helps it, all these occurring too late in the day.

And while Respondent draws attention to the fact that, when negotiations commenced on new contracts, the Association was in the habit of sending proxies to regular members as well as to non-members, the record demonstrates that there was no requirement that regular members sign and return the proxies, and in fact some did not. Indeed, Strong admittedly did not sign all such proxies and did not recall whether he signed one in 1960, despite the fact that he lived up to the 1960 contract.

I find, in view of the foregoing considerations, that, on and after April of 1964, Respondent, by failing and refusing to sign and honor the agreement negotiated by the Association with the Union covering the period from August 15, 1963, through August 15, 1967, has refused to bargain and has engaged in unfair labor practices within the meaning of Section 8(a)(5) and Section 8(a)(1) of the Act. See *Mixermobile Manufacturers, Inc.*, 149 NLRB No. 60; *Ogle Protection Service, Inc.*, 149 NLRB No. 50 and *Tulsa Sheet Metal Works, Inc.*, 149 NLRB No. 120.

IV. The effect of the unfair labor practices upon commerce

The activities of Respondent, set forth in Section III and occurring in connection with its operations described in Section I, above, have a close, intimate and substantial relationship to trade, traffic and commerce among the Several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

It has been found that Respondent has refused to bargain with the Union as the duly designated representative of its employees in an appropriate unit. I shall therefore recommend that Respondent sign and honor the agreement negotiated between the Association and the Union covering the period from August 15, 1963, through August 15, 1967, and that it pay to the appropriate source any fringe benefits provided for therein.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law

1. Joseph T. Strong d/b/a Strong Roofing & Insulating Co. is an employer within the meaning of Section 2(2) of the Act.

2. Roofers Local 36, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association is a labor organization within the meaning of Section 2(5) of the Act.

3. All roofers employed by members of Roofing Contractors' Association of Southern California, Inc., including Respondent, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Roofers Local 36, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association has been at all times since August 15, 1963, and now is, the exclusive representative of all employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

5. By refusing on and after April, 1964, to bargain in good faith with the Union as the exclusive representative of its employees in the aforesaid appropriate unit, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the foregoing conduct, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, it is recommended that Respondent, Joseph T. Strong d/b/a Strong Roofing & Insulating Co., Alhambra, California, his agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize Roofers Local 36, United Slate, Tile and Composition Roofers, Damp and Water-

proof Workers Association as the representative of its employees in the above-described appropriate unit and refusing to honor the 1963-1967 contract between said Union and Roofing Contractors' Association of Southern California, Inc.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Forthwith execute and honor the 1963-1967 agreement between the Union and Roofing Contractors' Association of Southern California.

(b) Pay to the appropriate source any fringe benefits provided for in the above-described contract.

(c) Post at its offices at Alhambra, California, copies of the notice attached hereto and marked Appendix.[5] Copies of said notice, to be furnished by the Regional

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[5] In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

Director for the Twenty-first Region, shall, after being duly signed by Respondent, be posted immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Twenty-first Region, in writing, within 20 days from the date of the receipt of this Decision and Recommended Order what steps it has taken to comply herewith.[6]

Dated:

MARTIN S. BENNETT

Martin S. Bennett
Trial Examiner

[6] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended we hereby notify you that:

WE WILL NOT refuse to recognize ROOFERS LOCAL 36, UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION as the representative of our roofing employees.

WE WILL honor and sign the contract executed between ROOFING CONTRACTORS' ASSOCIATION OF SOUTHERN CALIFORNIA, INC. and ROOFERS LOCAL 36, UNITED SLATE, TILE AND COMPOSITION ROOFERS, DAMP AND WATERPROOF WORKERS ASSOCIATION for the period August 15, 1963, through August 15, 1967, covering a unit of all roofers employed by members of said Association.

WE WILL make whole the appropriate sources for any unpaid fringe benefits provided in the above contract.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities, except to the extent that such right may be affected by an agreement

requiring membership in a labor organization as a condition of employment.

JOSEPH T. STRONG d/b/a
STRONG ROOFING & INSULATING CO.

(Employer)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 849 South Broadway, Los Angeles, California (Telephone No. 688-5204), if they have any question concerning this notice or compliance with its provisions.

APPENDIX C

STATUTES INVOLVED

National Labor Relations Act, as amended:

"Sec. 8. (a) It shall be an unfair labor practice for an employer —

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

". . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

". . . .

"Sec. 10. (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or

amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

". . .

"(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to

questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."